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April 6, 2007

VIA EMAIL, FACSIMILE AND U.S. MAIL

Tami R. Bogert, Esq.
General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, California 95814

Re: **Comments by International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), AFL-CIO on Proposed Revisions to PERB's Card Check Recognition Regulations**

Dear Ms. Bogert:

We are writing on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO with respect to the proposed changes to the existing PERB regulations. As PERB is aware, the UAW successfully used the card check procedures in 2004 and currently represents a unit of 6000 academic student employees at California State University. The UAW also used the card check procedure when it initiated and later withdrew a petition in 2006 for a unit at the University of California. These real life experiences and the research we have done in the course of these proceedings inform our comments herein.

I. PROPOSED AMENDMENTS TO SECTION 32700 - PROOF OF SUPPORT

A. PERB May Not Require These "Warnings" To Employees.

The proposed regulation seeks to add a requirement to Section 32700(a) that proof of support in the context of a card check must contain language that the employee understands that an election may not be conducted. This proposed amendment should be rejected for a number of reasons.

This amendment is completely contrary to the legislative history of the card check legislation, which is codified at Government Code Section 3577(a)(2)(A).[1]

[1] While the UAW's comments are directed at the regulations issued under HEERA, they also bear on the proposed changes that would apply under EERA.

Assembly Member Loni Hancock introduced AB 1230 in 2003. The University of California was the only entity that offered any opposition to this bill mentioned anywhere in the legislative history.

The University submitted written comments supporting its opposition. These comments, which are attached hereto as Exhibit A, proposed in pertinent part:

> A proof of support document signed by an employee shall include the following text in 12 point typeface or larger: "I understand that if I sign this document a union may be certified without my having an opportunity to vote."

The author of AB 1230 rejected this proposal and no other legislator proposed such an amendment. AB 1230 was passed by the Legislature without the language that the University of California sought.

Even so, when the bill went to the Governor's desk the lobbyist for the University of California wrote to him, with the following complaint:

> In an effort to work with the author to find a compromise, UC proposed an amendment that would have permitted certification of a union with an election and provided some information regarding union membership. Specifically, UC requested an amendment to require union authorization cards to include text explaining that a union may be certified without an election.... Under AB 1230, unions would not be required to disclose this factual information to employees when circulating authorization cards. Unfortunately, Assembly Member Hancock did not accept the proposed amendment.

(See Exhibit B attached hereto) Despite the University of California's objections, the Governor signed the bill.

It would not only be contrary to the intent of the Legislature, but beyond PERB's authority, to place language on authorization cards based on arguments that the Legislature and the Governor explicitly rejected. While PERB has the authority to develop regulations, it does not have the authority to amend the law, much less to insert requirements that the Legislature rejected.

Moreover, adding such language to proof of support would create absurd results. The regulations provide that proof of support can be demonstrated not only by authorization cards, but by current dues deduction authorization forms, membership

applications, authorization cards or petitions signed by employees or a notarized membership list.[2] The proposed language would have no place on a membership card or membership list or dues deduction card, which have nothing to do with elections but are statements of the employee's desire to be represented by the union. Nor, for similar reasons, does it belong on an authorization card.

Finally, this proposal should be rejected on policy grounds. The proposal appears to be rooted in the belief that card check is a less reliable or fair way to gauge employee sentiments and that the Board should require unions to tell employees to hesitate before signing a card. But that is not what the Legislature concluded; on the contrary, it found that card checks are a fair, reliable and efficient way to allow employees to choose whether they want to be represented.

In fact, in practice, it is often a more democratic alternative, for the union must demonstrate that it represents a majority of the unit, whereas in an election the union only needs to show that it represents a majority of those voting. As an example, when the UAW won recognition at CSU the Union had to demonstrate that over 3000 out of 6000 employees wanted representation. If there had been election, history demonstrates that far fewer employees would have come to the polls.

B. PERB's Regulation For Evaluating "Fraud" And "Coercion" Should Be Eliminated.

PERB also proposes to amend Section 32700(g) to change the procedure for evaluating claims of fraud or coercion with respect to the gathering of cards. Section 32700(g) does not properly belong in the context of procedures for proof of support and should be deleted in its entirety from the regulations.

This is highlighted by the fact that this section of the regulations, even with the proposed amendment, provides no set procedures for litigating such a claim. No process is set forth for determining how to resolve a dispute with respect to material facts. If indeed a claim "that proof of employee support was obtained by fraud or coercion" is to be raised, the appropriate forum should be an unfair labor practice.

Further, since Section 32700(g) is limited to the parties, the employer already has the option of raising such concerns as part of the process provided for in Section 51080. Section 32700(g) is superfluous and does not provide the necessary procedural

[2] The proposed regulations also seek to delete the option of "other evidence as determined by the Board." No explanation is given for this proposal. It is not clear what problems the deletion seeks to address. The UAW believes that the agency should maintain such discretion in this regard to effectuate the purposes of the Act.

protections provided for in the processing of a petition or a claim of an unfair labor practice.[3]

II. PROPOSED ADDITION OF SECTION 32705 – REVOCATION OF PROOF OF SUPPORT

A. The Concept of Revocation Should Not Be Incorporated Into HEERA.

The regulations seek to add the concept of revocation to the card check process. PERB does not have the legal authority to make such change. Even if it did, the current proposed regulation is neither workable nor consistent with the purposes of the Act.

The Legislature amended HEERA to provide for Section 3577(a)(2)(A), which provides in pertinent part:

> If the petitioning employee organization provides proof of support of more than 50 percent of the members of the appropriate unit, and no other employee organization has provided proof of support of at least 30 percent of the members of the appropriate unit, the employee organization providing the proof of support of more than 50 percent of the appropriate unit shall be certified by the board as the exclusive representative, as provided in subdivision (a) of Section 3563 and, where applicable, in Section 3579. The procedures for determining proof of support shall be defined by regulations of the board.

When card check was added to HEERA, it applied the proof of support defined by the statute at the time. While it might have anticipated that PERB would spell out the procedures for determining proof of support, such as time lines, eligibility lists and the like, nothing in the statute indicates that the Legislature gave PERB the authority to modify the statutory definition of proof of support.

Altering the regulatory underpinning so radically would effectively amend the statute, a role PERB should not take on. Indeed, nowhere in the statute does it provide for anyone other than the union to submit proof of support. Allowing individuals to

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[3] We note that Section 32700(g) is not being amended to cover revocations. Nor is there any comparable language in proposed Section 32705 of these regulations. We find it incongruous that someone can claim an authorization to be represented by a union was obtained by fraud or coercion and yet no such claim can be made regarding a revocation. This highlights the need, discussed below, for the revocation to be served on the union so that it can address any such issues that may arise.

submit "proof of support" in the form of revocations alters the clear terms of the legislation. PERB does not have the authority to take such action.

The regulations themselves state that "proof of employee support for all petitions requiring such support shall clearly demonstrate that the employee desires to be represented by the employee organization for the purpose of meeting and negotiating or meeting and conferring on wages, hours and other terms and conditions of employment." The concept that the negative could be shown is not anticipated in any fashion.

We recognize that PERB recently applied the concept of revocation under the Meyers-Milias-Brown Act, Government Code § 3500 *et seq.* *Antelope Valley Health Care District*, PERB Decision 1816-M, 30 PERC 60 (2006). That decision is not, however, applicable to the recognition procedures provided under HEERA or EERA.

Antelope Valley arose under a very different statute, the Meyers-Milias-Brown Act. Section 3507.1 of MMBA provides for card checks, but gives PERB a wholly different role: it does not conduct the card check and is not required to adopt regulations governing them. On the contrary, the Act leaves the task of determining whether the union has shown that it has majority support to the State Mediation and Conciliation Service. The Act not only does not direct PERB to adopt regulations governing how to determine whether the union has majority support, but allows local governmental entities to prescribe—and amend—their own regulations governing the methods for conducting a card check. Those procedures may vary widely from one entity to the next, so long as they meet the modest standard of "reasonableness."

In the *Antelope Valley* case, however, the SMCS did not, for reasons that are not wholly clear, carry out its obligations to resolve the issue of majority status, but simply came up with several alternative tallies, without reaching any conclusions whether the purported revocations were valid. There were, moreover, no local agency regulations for PERB to apply. PERB therefore had no choice but to make a case-specific decision of its own concerning the validity of the purported revocations on an *ad hoc* basis.

That decision was, however, highly fact-intensive as well as case-specific. Both PERB and the Administrative Law Judge placed great weight on the fact that, while some employees were circulating "No Union" forms, the employer drew up a model form for revocation of authorizations, which hardly any employees bothered to sign. That factored heavily in PERB's rejection of those "No Union" forms. As PERB stated:

> [T]he District by its own conduct appears not to believe that the "No Union" slips were valid revocations of the SEIU authorization cards when it issued the January 28 e-mail.

Far from adopting any rules of general application, PERB crafted a decision grounded in the particular facts of that case. That standard should not be applied under either HEERA or EERA, which require that PERB itself conduct the election and/or verify proof of majority status.

In addition, this proposed regulation, which would make any card voidable until it is counted, is contrary to the way PERB conducts elections under HEERA and EERA. When PERB conducts mail ballot elections it does not allow employees to retrieve their ballots, once cast, or to petition PERB not to open the envelopes in which they have mailed their ballots. On the contrary, PERB proceeds on the common-sense proposition that once an employee has checked the ballot and deposited it, that ballot is inviolate. The same rule should apply to an authorization card that an employee has signed.

Experience illustrates the wisdom of refusing to allow this sort of belated revocation of authorization cards. One of the key goals of the 2003 amendments to HEERA that provide for recognition based on proof of majority support through authorization cards and other means was to reduce the opportunity for employers to pressure employees into abandoning their support for the union. Allowing revocation would open a door that the Legislature intended to close. PERB should not allow for revocation of authorization cards under either HEERA or EERA.

B. Any Regulation That PERB Might Adopt Should Require That The Revocation (1) Be Served On The Union To Which The Employee Belongs Or Gave Representation Authorization (2) Before The Demand For Recognition Is Made.

Furthermore, if the Board were to adopt regulations under HEERA and EERA that allow for revocation in card check proceedings, those regulations should be drafted as clearly as possible in order to ensure that employers or opponents of collective bargaining do not seize on revocation as a means to delay a procedure that the Legislature intended to be simple and expeditious. The current version would do just the opposite.

Any regulation that PERB might adopt should ensure that the revocation (1) be served on the union that the employee either joined as a member or to which he or she gave representation authorization (2) before the demand for recognition is made. Allowing belated revocations or revocations that the union never sees would change the very nature of the card check process that the Legislature prescribed.

1. Notification to the union is essential.

When an employee joins a union or signs an authorization card, he or she is entering into a contractual relationship with that union. If the employee wants to

change that relationship, *i.e.*, if he or she no longer wishes to be a member or to have the union represent him or her, then the employee must notify the union—not some third party, such as PERB or the employer.[4]

Requiring notification to the union is consistent with the law under the National Labor Relations Act. As the NLRB recently confirmed "it is well-established that an authorization card cannot be effectively revoked in the absence of notification to the union prior to the demand for recognition." See *Raley's*, 348 NLRB No. 25, 2006 WL 2842123, (2006), upholding *Alpha Beta Co.*, 294 NLRB 228, 230 (1989).

This requirement is also consistent with the facts in *Antelope Valley*, where employees were required to serve the union with the notice or revocation. Indeed, in the course of the UAW's recent campaign to organize post-doctoral employees of the University of California the University's web page specifically instructed employees who wanted to revoke their authorization cards: "You will need to send the Union, in this case the UAW, a *signed dated* letter which expressly revokes your authorization." (see: http://ucbcollectivebargaining.berkeley.edu/authcards.html) Anything less would be ineffective.

2. The union must be notified of revocation before it makes its demand for recognition.

The timing of the service of the revocation must also be modified. The union commences the recognition process by making a demand for recognition. The union must be able to determine, before it puts PERB, the employer and itself through this process, whether it actually represents a majority of the members of the unit. Indeed, the union must be able to make that calculation in order to make such a claim. That practical necessity led the NLRB in *Raley's* to reject revocations that only surfaced after the union made its demand for recognition.

Proposed Section 32705, if adopted, should therefore modify subsection (b)(4) to state:

> Be served on the union and PERB no later than the date for demand for recognition is made on the Employer.

---

[4] Moreover, proof of support can be shown by dues deduction authorization forms, membership applications, authorization cards or petitions signed by employees or a notarized membership list. The very nature of the items that can serve as proof of support demonstrates the union's ownership of the proof of support and the reason why any "revocation" of the desire to be represented by the union must be served on the union.

We agree, however, that any such revocation documents should be maintained as confidential, just as proof of support documents are, and should not be shared with the employer. The words "to anyone other than the petitioning union" should be added to proposed Section 32705(c).

III. PROPOSED AMENDMENT TO PERB REGULATION SECTION 32784 – DEADLINE FOR SUBMISSION OF LIST OF BARGAINING UNIT EMPLOYEES

The proposed regulations seek to delete the 20-day requirement for the employer to submit the list of employees in the unit, currently set out in Section 32784, and to provide instead that the Board will have discretion to establish any timeline it chooses on a case-by-case basis. Nothing in the comments sheds any light as to why this change has been proposed.

We can only gather that there is a concern that in certain instances 20 days may not be sufficient for an employer to compile a list. The UAW is concerned, however, that without any set timeline there will be not only be no certainty in this area, but that employers may routinely seek to bargain with PERB over when this list is due.

That would, of course, undercut one of the primary goals of this statute: to avoid the delays and seemingly endless litigation over large and small issues that deny employees the right to representation by delaying it for years. If the intent of the change is to give the Board flexibility in unusual circumstances, then we suggest the addition of the following sentence to the end of 32784(a):

> The 20 days may be extended by the Regional Director upon a showing of good cause that additional time is necessary to prepare the list after consultation with all parties.

In reality that is what PERB has always done, so even this language may be superfluous. This proposed language is, however, far preferable to the current version, which eliminates all certainty in this area and invites employers to prolong what is supposed to be an expedited process.

Thank you for your careful consideration of these comments.

Sincerely,

Margo A. Feinberg

MAF:mlk
Attachments

cc: Les Chisolm (w/attachments)
Anita Martinez (w/attachments)
Maureen Boyd (w/attachments)
Mike Miller (w/attachments)
Georgi-Ann Bargamian, Esq. (w/attachments)
Scott Bailey (w/attachments)

UNIVERSITY OF CALIFORNIA
Requested Amendments to AB 1230 (Hancock), As Amended on 4/8/03

Additions indicated by underline
Deletions indicated by ~~strikethrough~~

1 page 4 line 12 add:

(B) A proof of support document signed by an employee shall include the following text in 12 point typeface or larger: "I understand that if I sign this document a union may be certified without my having an opportunity to vote. I also understand that if a union is certified, it may require the University to deduct fair share service fees from my pay."

2. page 4 line 12 add:

(C) If an employee organization submits documents in proof of support, signed by employees, that do not include the above text in 12-point typeface or larger, the employee organization shall not be certified except as the result of an election.

3. page 4 line 12 strike and add:

~~(B)~~ (D) In the event the petitioning employee organization does not provide proof of support of more than 50 percent of the members of the appropriate unit, or another employee organization provides proof of support of at least 30 percent of the members of the appropriate unit, then the procedures of paragraph (1) shall apply.

4. page 4 line 37 add:

SEC. 3. Section 3577(a) of the Government Code is amended to read:

(a) Upon receipt of a petition filed pursuant to Section 3575 or 3576 the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition. The determination of the board may be based upon the evidence adduced in the inquiries, investigations, or hearings. If the board finds on the basis of the evidence that a question of representation exists, or a question of representation is deemed to exist pursuant to subdivision (a) or (b) of Section 3574, it shall order that an election shall be conducted by secret ballot placing on the ballot all employee organizations evidencing support of at least 10 percent of the members of an appropriate unit, and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. There shall be printed on the initial ballot the choice of "no representation". If, at any election, no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election. If a petition filed pursuant to Section 3576 includes evidence that more than 50 percent of the members of the certified unit support decertification of the exclusive representative, and if the petition does not request that another employee organization be certified as the exclusive representative, then the board shall decertify the incumbent exclusive representative.

EXHIBIT A

UNIVERSITY OF CALIFORNIA

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OFFICE OF THE PRESIDENT

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Interim Vice President – Laboratory Management

Office of State Governmental Relations
1130 K Street, Suite 340
Sacramento, California 95814
(916) 445-9924
Stephen A. Arditti, Assistant Vice President and Director

July 31, 2003

The Honorable Gray Davis
Governor
State Capitol
Sacramento, CA 95814

Dear Governor Davis:

Re: AB 1230 (Hancock), As Amended on June 17, 2003

The University of California (UC) respectfully requests that you veto AB 1230. This measure would amend the Higher Education Employer-Employee Relations Act to require the Public Employment Relations Board (PERB) to certify an employee organization as an exclusive representative for the purpose of collective bargaining, if the employee organization provides proof of support from more than 50 percent of the unit. UC opposes AB 1230 because it would require certification of a union without an election and deny employees an opportunity to make fully informed decisions regarding union membership.

In an effort to work with the author to find a compromise, UC proposed an amendment that would have permitted certification of a union without an election and provided employees some information regarding union membership. Specifically, UC requested an amendment to require union authorization cards to include text explaining that a union may be certified without an election, and if certified, the union may require the University to deduct fair share service fees from an employee's pay. Under AB 1230, unions would not be required to disclose this factual information to employees when circulating authorization cards. Unfortunately, Assembly Member Hancock did not accept the proposed amendment.

Employees of the public schools, community colleges, and state agencies all enjoy the benefits of a representation election. When asked to consider joining a union, these employees have ample time to learn about the significance of union membership, gain a full understanding of collective bargaining, and review the employer's record of responsiveness to employee concerns. Those who decide to join a union have time to research prospective representatives. Most importantly, employees have an opportunity to make their decision regarding exclusive representation in the privacy of a polling booth, free from any outside influences. They also have the flexibility to choose "no representation," an option that must be presented in an election. AB 1230 would deny University employees these benefits.

Elections do not appear to have impeded union organizing at UC. Since 1980, UC employees have selected exclusive representation in 32 of 44 elections. Over 40 units (systemwide and local combined) represent approximately 67,000 employees, or about 65 percent of the employees eligible for union membership.

EXHIBIT B

As always, we appreciate your consideration of our views and your consistent support of the University.

Sincerely,

Stephen A. Arditti
Assistant Vice President and Director
State Governmental Relations

cc: Assembly Member Loni Hancock
Legislative Secretary Linda Adams
Special Assistant and Liaison to the Senate Bill Lloyd
Secretary Kerry Mazzoni
Director Marty Morgenstern, Department of Personnel Administration
President Richard C. Atkinson
Senior Vice President Bruce B. Darling

[illegible]

EXHIBIT B